judicial powers, and provision was made for the former in the creation of Congress, and for the latter in the creation of the Supreme Court, and by conferring authority on Congress to create other courts. The courts thus created were vested with jurisdiction in admiralty and at common law and in equity."

SALES UNDER DEEDS OF TRUST—UNAUTHORIZED SALES—DEFECTIVE EXECUTION OF POWER.

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Much prominence has recently been given at the meetings of the State Bar Association to the discussion of the Torrens System of Registering Title to Land. This discussion has undoubtedly sprung from a realization on the part of the profession of the many defects in our present system of registering the evidences of title —as distinguished from the title itself—and has resulted in a fixed resolve[1] to remedy the evil by recommending to the legislature the Torrens System.

Many are the defects in our present system. Many are the risks taken by a lawyer in passing upon a land-title. Numerous things which materially affect a title do not appear of record, and it is often necessary to make outside inquiry to ascertain facts on which the title may depend, concerning which the records furnish no clue. Perhaps to some lawyers the question is simply, "how far must I pursue these inquiries in order to relieve myself from liability to my client should the title prove defective by reason of some defect which the records do not disclose?" but, it is believed, with most lawyers their client's welfare is the chief end.

The negotiable instrument—like the seaman to courts of admiralty—seems to be considered the special ward of the courts of common law, as well as of the legislature; its safe and speedy transfer—with no other passport than its countenance—is generally recognized as vital to the business interests of a country. The legislatures of many states, in order to set at rest certain conflicting

[1]See XV Reports of Virginia State Bar Association (1902), p. 33.

views of the courts, have, by the "Negotiable Instruments Act,"[2] culled the most progressive of these views and crystallized them into statute law, thereby securing certainty and definiteness in regard to this subject, where before, in some cases, there had been uncertainty. It has even been proposed that there be a national law on the subject. Little evidence is required to establish ownership of shares of stock.[3] But in regard to real estate, in many communities the basis of a man's credit, little has been done either by courts or legislatures in the interest of security of title. The courts are singularly conservative, adhering to the strict letter of the law, recalling and enforcing old common law maxims and doctrines, and seem loath to yield one jot to the security of title. In fact, it sometimes seems that they take a fiendish delight in upsetting titles on the barest technicality where there has been quiet possession and enjoyment for years.

These reflections on the general subject of the insecurity of land-titles have led to a consideration of the particular subject of those titles which have passed through a trustee's sale, under a deed of trust to secure debts; the risks incurred by the purchaser; and the necessity for outside inquiry in examining such a title. An ordinary deed of trust to secure the payment of a negotiable note provides, among other things, that

"On default in the payment of said note, or the interest aforesaid, as it shall become due, or in the observance of any covenant in this deed contained, the said trustee shall on request of the holder of the note, sell the above granted property at public auction, at such time and place, and upon such terms and conditions, as he deem expedient, having first given notice of such time and place of sale for at least ten days, by advertisement in one or more newspapers published in the city of Norfolk."

In examining the title to property which has been sold under a deed of this kind, these questions suggest themselves: Has default been made in the payment of the debt or interest? Was the trustee directed by the creditor to sell? Did he advertise in accordance with the provisions of the deed? Did he attend the sale and conduct it in person? If any of these inquiries must be answered in the negative, is the title thereby rendered invalid? All of these matters could perhaps be easily ascertained by the purchaser at the sale; but how about the remote purchaser, who purchases the prop-

[2]Acts 1897, p. 896. [3]Holland v. First Nat. Bank of Richmond, 99 Va. 495.

erty many years after the sale, and after it has changed hands several times? Is it still necessary for him to find out who the creditor was (*i. e.* who held the note) at the time of sale? whether at that time there had been default in the payment of the debt? and whether the trustee had been authorized by the proper party to sell? Is it necessary for him to look back through the files of the various newspapers published in a city, to satisfy himself that the trustee advertised the sale the requisite number of days? Or, in case the trust deed provides another, not uncommon, mode of advertisement, to discover what in the trustee's opinion was "the most conspicuous place on the premises;" and then ascertain whether in fact the notice of sale was posted there the requisite number of days? These duties, if they be duties, would entail much inconvenience, and, in some cases, be impossible of performance. It is proposed to discuss briefly some of these questions.

THE TRUSTEE'S DEED CONVEYS THE LEGAL TITLE.

Whatever doubt there may be about other questions, one thing is certain, the trustee's deed conveys the legal title to the property. It is held almost universally that by the grantor's deed to the trustee, the legal title passes from the grantor and vests in the trustee; and that the trustee, being so invested with the legal title, may convey it by his deed, notwithstanding the fact that the occasion for the sale as contemplated by the deed of trust has not arisen, or that he sells in direct violation of the terms[4] of the deed. The reason for this is found in the refusal of the common law courts to recognize uses and trusts. It being once established that the legal title is vested in the trustee, it necessarily followed that by his deed alone can the title to the property be conveyed; and, in an action of ejectment to try title to land, no evidence is admissible to show that the sale was in violation of the provisions of the trust deed. In 2 Min. Inst. (4th ed.) 341, Mr. Minor, in treating of this subject, lays down the following doctrine:

"But although the trustee should sell ever so much contrary to the terms of the deed, or to his general duty, yet by his conveyance the legal title passes, and the purchase is to be assailed in a court of equity alone. In that court, however, any material departure from the provisions of the deed or from the line of his duty, will vitiate his proceedings. But if his

[4]Taylor v. King, 6 Munf. 365; Norman v. Hill, 2 Pat. & Heath 676; Stephens v. Clay (Col.), 30 Pac. 43; 2 Min. Inst. (4th ed.) 341.

conduct has been fair and honest, although it may have been irregular, the court will interpose very reluctantly, especially after the lapse of a considerable time, nor ever against a *bona fide purchaser* for valuable consideration and without notice."

This doctrine must be carefully distinguished from that laid down in the case of *Sulphur Mines Co.* v. *Thompson*,[5] where it was held that the sale must be made in accordance with the provisions of the deed of trust before the legal title would pass. In that case the personal representative of the trustee, who executed the trust, did not have the legal title. He had only a power of sale, and, of course, could only convey the legal title by complying strictly with the chart of his powers.

This is the doctrine of the common law courts. But courts of equity recognize uses and trusts, and give effect to them; so, though the trustee's deed may pass the legal title, it does not follow that the purchaser gets a complete title which a court of equity will recognize and sustain.[6] Whether or not the equitable title passes, depends on various considerations which will now be discussed. The subject may be divided into two heads, (1) Unauthorized Sale by the Trustee, (2) Defective Execution of Power of Sale.

UNAUTHORIZED SALE BY THE TRUSTEE.

By unauthorized sale is meant, one made by the trustee before the happening of the conditions on which the power to sell is limited—either before there has been default in the payment of the debt secured, or before he is requested by the creditor to sell. There may not have been default in the payment of the debt, either because the debt was not due, or because it had been paid. Before the trustee can rightfully sell the property under the power of sale, there must (1) be default in the payment of the debt, or of the interest, or in the observance of some covenant in the deed; and (2) he must be requested to sell by the creditor secured. Up to the time of the default of the debtor and the request of the creditor, although the legal title is in the trustee, his duties are passive. It is not until after the happening of these two things that his duties

[5]93 Va. 293, 315. See, also, Reusens v. Lawson, 91 Va. 226, where it was held that the clerk of a court in making a deed of land sold as delinquent for taxes, exercises a mere naked power, and that no title to the land—legal or equitable—passes thereby unless every prerequisite for the exercise of the power has been complied with. In such a case, the clerk has no title to the land.

[6]Taylor v. King (supra); Norman v. Hill (supra.)

become active and he can rightfully and lawfully sell. Clearly, if he sell before this time, he commits a breach of trust, and may be accordingly held liable. But the subject of our inquiry is not in regard to this. We are considering what title the purchaser gets.

Much confusion on this subject has arisen from the general statements found in text books, and from the *dicta* found in the opinions of judges. In the text books, we find it stated with confidence that the trustee in selling under the deed of trust must strictly follow the provisions contained therein, else no title will pass, the sale will be void, and the owner will not be divested of his equity of redemption.[7] With equal confidence, but with no attempt to distinguish, it is asserted that if one purchases for a valuable consideration, and without notice of irregularities in the execution of the deed of trust, he will not be affected thereby.[8] In most of the cases in which the question has arisen, either the creditor secured bought in the property for his debt,[9] or the purchaser knew of the defective execution,[10] or had not paid all of the purchase money at the time suit was brought to set aside the sale.[11] While there can be no doubt in these cases that the sale is void, and few will criticise the courts for so holding, the language used is often comprehensive enough to embrace the case of a *bona fide* purchaser without notice, as to which the courts were not called upon to decide. Until the *bona fide* purchaser—he who has bought the property from the purchaser at the trustee's sale, without any notice of defects—is before the court pleading for his property, until the court is confronted by the stern reality that the effect of its decree may be to take from him property which he has in good faith bought and paid for, the gravity of the case, and the true strength of his position cannot be fully appreciated. Oftentimes it will be difficult for a prospective purchaser of property, which has passed through a trustee's sale, to find out whether or not the sale was authorized. The original creditor may have transferred the note secured to another party, who, in turn, may have transferred it again, or pledged it as collateral security, thereby rendering it difficult to ascertain who the creditor was. The deed from the trustee may recite that

[7]Jones on Mortgages (5th ed.), sec. 1822.
[8]Jones on Mortgages (5th ed.). sec. 1898.
[9]Norman v. Hill (supra); Penny v. Cook, 19 Iowa 538.
[10]Walker v. Beauchler, 27 Gratt. 516.
[11]Gibson v. Jones, 5 Leigh 370.

the debt was due, and that the creditor directed him to sell, and yet these recitals may be false. In *Brown* v. *Taylor's Committee,*[12] our court held that mere possession of a bond was not such evidence of ownership as to justify a payment to the holder, without express or implied authority from the true owner to collect same. If such a holder has no right to collect the money, he clearly has no right to authorize the trustee to sell; so, although the purchaser at the trustee's sale traces down the bond secured (the same principle would doubtless apply to a past due note), and finds it in the hands of the very party who directed the trustee to sell, yet further inquiry may be necessary to ascertain the authority of the holder to direct sale. On behalf of the innocent purchaser, the maxim that "where equities are equal the law shall prevail," may be invoked, since he has the legal title. This, then, is the strength of his position. On the other hand, the rights of the creditor and of the owner of the property, must not be overlooked. If the unauthorized acts of the trustee in selling the property before default is made in the payment of the debt secured, or even after it has been paid, are binding on them, the one may lose the security for his debt, and the other his property, although each may have been without fault or negligence. The argument on behalf of the innocent purchaser at such a sale, that he should prevail because, having the legal title and an equal equity, the maxim "where equities are equal the law shall prevail" applies, serves only to remove the discussion one step farther. In its last analysis it presents the question, has he an equal equity? The deed of trust sets forth the conditions on which sale shall be made, and the purchaser is thereby put on notice. The argument that the trustee is the agent of both debtor and creditor is met by the reply that, although he is in a sense their agent, he is a special agent under a power of attorney containing certain limitations, of which the purchaser has notice. He must know that the deed of trust is only security for a debt; that the trustee is in no sense the absolute owner of the property, but has a *trust* to perform; that before he has any right to sell, two things must happen, (1) the debtor must make default in the payment of the debt, and (2) the creditor must direct the sale to be made. When it is realized that the execution of the power of sale is not a proceeding in a court of equity, where both the debtor and creditor are

[12]32 Gratt. 135. See, also, Willis v. Gorrell (Va.), 47 S. E. 826.

necessary parties, and where their rights are carefully guarded by the court, but is a summary proceeding, it is hardly too much to require of the purchaser that he shall, at his peril, ascertain whether the trustee was duly authorized to sell, and whether the conditions on which the sale was made have happened. Conviction deepens on examining of the authorities. We will first briefly review the Virginia cases on the subject.

In the passage already quoted from 2 Min Inst. (4th ed.) 341, there is the following sentence:

"But if his (the trustee's) conduct has been fair and honest, although it may have been irregular, the court will interpose very reluctantly, especially after the lapse of a considerable time, nor ever against a *bona fide* purchaser for valuable consideration and without notice."

The case of *Hughes* v. *Caldwell*[13] is cited as authority for this proposition. Under the peculiar facts of that case it was held that, although the sale was improperly made by the executors of the deceased trustee, yet, since their conduct had been fair, an adequate price had been obtained for the land, the debts had been paid out of the proceeds of sale, the surplus had been distributed among those entitled thereto, and no one had suffered any injury therefrom, the court would not set aside the sale. The correctness of the decision is beyond question, but, it does not lend support to the proposition that an unauthorized sale is valid in equity when the property has passed into the hands of a *bona fide* purchaser for valuable consideration.

In *Gibson's Heirs* v. *Jones*,[14] a bill in equity was exhibited by the heirs of a grantor against the trustees in a deed of trust to secure the payment of a debt. The purchaser at the trust sale and his subsequent vendee, asking that the trustee's sale be set aside for the reasons, (1) that at the time of sale nothing was due the creditor, (2) that the sale was made without due advertisement. At the sale, the creditor bought in the property for his debt, and, later on, sold it to one Read. It appeared from the answer of Read that he had bought the property from Jones without any notice of irregularities in the sale, but that he had subsequently heard of the plaintiff's claim, and, on that account, had withheld the balance of

[13]11 Leigh 348. The other cases which are cited by the author are in support of other propositions stated in the same paragraph. For a somewhat similar case, see Morgan v. Glendy, 92 Va. 86.

[14]5 Leigh 370.

the purchase price due by him. In this case, it is clear that Read could not avail himself of the defence of a purchaser for value and without notice, because he had notice of the plaintiff's claim before he became a complete purchaser by paying all of the purchase money. He, therefore, occupied the same position he would have occupied had he been the immediate purchaser. The court remanded the cause to the lower court to ascertain whether or not the debt had been paid, and what amount had been retained by Read. As to the allegation that the sale had been made without advertisement, the court held that the burden of proof was on the defendants who claimed under the sale to prove that the advertisement was regular. The cause was not at the time of the decision ready for a final adjustment, so it cannot be regarded as decisive of the question under discussion, although Judge Tucker used strong language in commenting on the duty of the purchaser at a trustee's sale.[15]

The case of *Walker* v. *Beauchler*[16] is interesting in this connection. In June, 1854, John Beauchler purchased a tract of land in the county of Alexandria. In 1861, the Union forces having taken possession of that part of the county, he removed to Fairfax C. H., within the Confederate lines. On June 6, 1859, he conveyed this property to Jones, of Georgetown, D. C., in trust to secure a note for $300, payable two years after date to one Fearson. In October, 1864, on request of Fearson, Jones, having advertised the sale in an Alexandria paper, sold the land at public auction in the city of Georgetown to Mrs. Barrett, and gave her a deed to same. Later, Walker acquired the property from her. In October, 1870, Beauchler brought suit to set aside the trustee's sale, and the subsequent sales, on the ground that at the time of the trustee's sale, he, Beauchler, was living in Virginia, and, on account of the existence of war, and military regulations, was unable to visit the place where the pretended sale occurred, and therefore was not in default in paying the debt. He also charged that all of the parties were

[15]"The bill charges the sale to have been irregularly made and without advertisement, by which a great sacrifice was produced. The answer does not allege that there was an advertisement. The defendant took it for granted the proceedings were regular. It became him to prove they were so." At page 375.

See, also, Norman v. Hill (supra), where a sale was set aside on the ground that the purchaser did not prove that it was duly advertised, and that the sale was for cash instead of on credit. But here one of the creditors secured under the deed of trust bought in the property at the sale, and it was as to his rights that the court was called to pass upon.

[16]27 Gratt. 516.

related, and that Walker had notice of the irregularities in the sale. Walker answered that he was a *bona fide* purchaser for value and without notice. The court held that as the parties were on opposite sides of the belligerent lines, there was no default in the payment of the debt secured; that until there was default the trustee could not sell; and that since Walker was present at the sale, and doubtless had knowledge of all the facts, he could stand on no higher ground than the parties under whom he derived title. The court did not decide the precise question herein considered—the rights of a *bona fide* purchaser. It clearly did not consider Walker as occupying that position. The doctrine is, however, laid down that a sale made by a trustee before default in the payment of the debt secured is void.

The pr cise question was presented to our Supreme Court in the recent case of *Wasserman* v. *Metzger*,[17] and we looked forward to its decision with genuine interest. The court was asked to set aside a sale made by a trustee, and subsequent sales made by parties claiming under his deed, on the ground that the sale had been made without any request from the creditor secured. The purchaser made the defence that she was a remote purchaser for valuable consideration without any notice that the sale had been unauthorized—and the question was fairly before the court. It declined, however, to consider the case on its merits, and remanded it for defect in parties. The lower court[18] had held that the sale was void, and the land was liable in the hands of the purchaser to be subjected to the debt of the creditor.

So far as we have ascertained, these are the only Virginia cases directly bearing on the subject.[19] While the precise point has not been decided, enough has been said by way of *dicta* to make it tolerably clear that in Virginia an unauthorized sale by a trustee is void in equity even as against a remote purchaser in good faith and for value,[20] and that, until our recent statute, the burden of proof was on him who claimed through the deed from the trustee, to prove that the conditions of the deed were complied with by the trustee.

[17]47 S. E. 820.

[18]The Court of Law and Chancery of the city of Norfolk, Hon. Wm. Bruce Martin, Judge.

[19]See Tavenner v. Robinson, 2 Rob. 280, in regard to deeds of trust on personal property; also, Evans v. Roanoke Savings Bank, 95 Va. 294.

[20]Acts 1897-8, p. 322, as amended by Acts 1899-1900, p. 1247.

Several text-book writers have espoused the cause of the innocent purchaser,[21] and there is a line of cases in Minnesota,[22] and one or two elsewhere,[23] presently to be considered, which take a like view of the question. In his excellent note to *Tyler* v. *Herring* (Miss),[24] Mr. Freeman gives to the innocent purchaser the weight of his authority. In many instances, the cases cited by the text-writers do not bear out their statements, and others can easily be distinguished. There are numerous decisions holding that the purchaser, immediate or remote, claiming through an unauthorized sale by a trustee, takes no title in equity as against the rights of the creditor or the owner of the equity of redemption.

The case of *Rogers* v. *Barnes*,[25] decided by the Supreme Court of Massachusetts, is exceedingly interesting. It was an action for damages brought by the mortgagor against the mortgagee. The first count in the declaration sets forth in substance that the plaintiff on March 2, 1893, made a mortgage to the defendant of a parcel of land to secure the payment of $1,200 in one year from date, with interest thereon payable semi-annually; that there was no default in the performance of the conditions of the mortgage, but that on October 16, 1893, the defendant sold the mortgaged premises at public auction for an alleged breach of condition, and conveyed them to some person, to the plaintiff unknown, whereby the plaintiff lost his premises. It appeared that the property was purchased

[21]Gibson v. Jones (supra); Norman v. Hill (supra). *Quære* now in Virginia as to effect of a sale made by a trustee on request of the creditor named in the deed of trust, but who at the time of the request was not the holder of the note, having transferred it to a third party, which third party had failed to have the transfer entered on the margin of the deed book, as provided in Acts 1897-8, p. 258.

[22]Jones on Mortgages (5th ed.), sec. 1898; 1 Devlin on Deeds (2nd ed.), sec. 410.

[23]Palmer v. Bates, 22 Minn. 532; Merchant v. Woods, 27 Minn. 396.

[24]Thompson v. McKay, 41 Cal. 221; Warner v. Blakeman, 36 Barb. 501.

[25]19 Am. St. Rep. 266, 296. "The courts of some of the states have made a distinction between the original purchaser at a trustee's sale and persons subsequently acquiring title under him. . . . With respect to the original purchasers, the above cases assume that, as between them, the conveyances under consideration would have been set aside in equity, though such assumption was not necessary to the determination of any of the cases. There are other cases in which the general rule is stated to be that the original purchasers from trustees must ascertain, at their peril, the existence of the facts authorizing the trustees to sell and convey, and in which the statement is something more than a *dictum*. Sears v. Livermore, 17 Iowa 297; 85-Am. Dec. 564. So far, however, as these cases have fallen within our observation, the original purchasers were parties for whose benefit, or in payment of whose debt, the sale was made, or who had notice at the time of their purchase of the irregularity complained of. Therefore we hesitate to accept the rule under consideration as applicable even as against the original purchasers when they were not interested in the sale and they purchased in good faith, while innocently ignorant of the act or omission of the trustee which is urged to invalidate his conveyance. In favor of such purchasers we think the equitable maxim must be applied, that where the equities are equal the legal title prevails."

at the sale by one Reed, who afterwards conveyed it to the defendant, and on September 3, 1894, the defendant sold and conveyed the property to one Rice. All of the conveyances were duly recorded, with the power of sale, foreclosure deed and affidavit as required by law. On the theory that the plaintiff had lost his land irrevocably, the jury found for him and brought in a verdict for $1,108.87. We quote from the opinion of the court:

"The difficult question in this case is one of damages. It was a condition precedent to the exercise of the power of sale that there should be 'a default in the performance or the observance' of the conditions of the mortgage, and as there was in fact no default, the sale was unauthorized. As between the mortgagor and mortgagee, the sale would be declared void. So long as the title to the land remained in the defendant, the plaintiff undoubtedly could have redeemed it from the mortgage. But Rice, in effect, has been found by the jury to have been a purchaser for value without notice of any unlawfulness in the sale, and the jury have assessed the damages on the theory that the plaintiff, by the acts of the defendant, has lost all title or interest in the premises. The law goes a great way in protecting the title of a purchaser for value, without notice or knowledge of any defect in the power of the vendor to sell, and his title is not to be affected by mere irregularities in executing power of sale contained in a mortgage, of which he has no knowledge, actual or constructive. (Citing cases.) In *Montague* v. *Dawes*, 12 Allen 397, it was held that a tender duly made by the mortgagor, but not followed by a bill to redeem, did not affect the title to a *bona fide* purchaser claiming title by *mesne* conveyances from the purchaser at a sale under the power in the mortgage. Still the general rule is that conditions precedent to the execution of a power of sale must be strictly complied with. (Citing cases *pro* and *con.*)

"On principle, we think it must be considered that in this commonwealth a mortgagee, when there has been no default or breach of the conditions of the mortgage, cannot sell the land mortgaged under the usual power of sale contained in a mortgage, so as to pass a good title even to a *bona fide* purchaser for value or to any subsequent purchaser from him. The mortgagor, undoubtedly by laches, or by acts amounting to an estoppel, may be prevented from contesting the validity of such a title. He may ratify the sale, and the deed given under the power of sale, by parol. *McIntyre* v. *Park*, 11 Gray 102, 71 Am. Dec. 690. The argument certainly is strong that a *bona fide* purchaser for value ought to be protected in his title by what appears in the record in the registry of deeds, in the absence of knowledge to the contrary; but, the argument is, we think, stronger that a mortgagor should not be deprived, without his knowledge, of his equity of redemption, by a sale under a power contained in a mortgage, which authorizes a sale only in case of default, when there has been no default."

In the case of *Bent Otero Improvement Co.* v. *Whitehead,*[26] the note secured by deed of trust was transferred to a third party, and afterwards the trustee sold the property without the request or knowledge of the holder, and it was bought in by an outside party who paid value for it. We presume the purchase was *bona fide,* as nothing to the contrary is intimated in the opinion of the court. Notwithstanding this, the sale was set aside. There are many other cases to the same effect.[27]

Another example of an unauthorized sale by a trustee is a sale made after the debt secured under the deed of trust has been paid, but before it has been formally released of record. Here we find the text-writers laying down the doctrine that in such cases an innocent purchaser will take good title.[28] The Minnesota Supreme Court has held in several cases[29] that an innocent purchaser at such sale takes a good title as against the owner of the property; but these decisions were controlled by the statutory provision in that state requiring the recordation of release deeds. In *Merchant* v. *Woods,* the facts were as follows: On February 20, 1872, M executed and delivered to Sarah Smith a mortgage, containing the

[26]38 L. R. A. 145. This case is interesting on account of the novel application of the doctrine of conversion to the unauthorized sale of real estate by a mortgagee. It was held that the mortgagor might sue the mortgagee for damages for the wrongful sale of the land, and obtain judgment, which when satisfied would operate to vest the title to the land in the purchaser claiming title to the land through the mortgagee. It is the familiar doctrine applicable to the conversion of chattels. The court decided that even though Rice did not take a good title on account of the unauthorized sale, the plaintiff (the mortgagor) could nevertheless recover full damages from the defendant, which, when paid, would operate to make Rice's' title to the land good as against the plaintiff. Three judges (including Holmes) dissented in so far as the decision applied the doctrine of conversion to the wrongful sale of real estate; but they also were of the opinion that Rice got no title to the land, and for that reason, the plaintiff ought not to have had substantial damages.

[27]25 Col. 354; 71 Am. St. Sep. 140.

[28]Kenney v. Jefferson County Bank (Col.), 54 Pac. 404 (an interesting case, where the rights of a *bona fide* purchaser are considered adversely). Temple v. Whittier, 117 Ill. 286; 7 N. E. 642; Huntington v. Crafton (Tex.), 13 S. W. 542; Cameron v. Irwin 5 Hill (N. Y.) 272. (All of which are cases where the rights of a remote *bona fide* purchaser are involved). Penny v. Cook, 19 Iowa 538. (This is a case where the creditor was the purchaser at the sale.)

[29]In Jones on Mortgages (4th ed.), sec. 1898, is found this statement: "If the mortgage be void, or if it has been paid, a purchaser with notice acquires no title; but, the mortgage appearing of record to be valid, a purchaser without notice does acquire title." In support of this latter statement, the following cases are cited:

Cameron v. Irwin, 5 Hill 272 (which holds just the contrary); Warner v. Blakeman, 36 Barb. 501 (to which we have not access); Penny v. Cook, 19 Iowa 538 (where a contrary view is expressed). Judge Dillon, in delivering the opinion, says that payment of the debt renders the trust deed *functus officio* and *ipso facto* extinguishes the power of sale; but, as the purchaser happened to be the creditor secured, the ase cannot be considered as positive authority for this); Ledyard v. Chapin, 6 Ind. 320 (which holds just the contrary; and Wade v. Harper, 3 Yerg. 383, where no such question was involved).

In 1 Devlin on Deeds (2nd ed.), sec. 410, the same general statement is made. The author is equally unhappy in his selection of cases in support of it—curiously enough, he cites these identical cases.

usual power of sale, on a vacant lot, to secure to her the payment of three negotiable notes for $100 each. In 1873 the lot was conveyed by M to Connelly, who assumed the balance of the debt secured by the mortgage. On April 10, 1874, Connelly paid the debt in full to an agent of Sarah Smith's who was duly authorized to receive payment, but had no authority to discharge the mortgage of record. He took a receipt from the agent, but did not receive the note. The agent did not enter the payment in his books, nor report it to his principal, nor account for it to her. Several years after this, Sarah Smith appointed Woods her agent, who received from her former agent the last note which had been paid by Connelly, which payment was not endorsed on it. Sarah Smith then proceeded to foreclose the mortgage for the satisfaction of this note, and at the sale the lot was bought by Woods, who received proper certificate of sale, which was duly recorded. At the time of the sale, Connelly had died and Merchant owned the property. There was no evidence that the owner had any notice of the foreclosure other than constructive notice of the advertisement. The foreclosure proceedings were regular, the mortgage had not been discharged of record, and the purchaser, Woods, paid the consideration in good faith, without notice that the indebtedness had been fully paid off. In October, 1878, an action was instituted by Merchant to recover the property from Woods. Upon these facts, the court held that the defendant, Woods, was entitled to the property. The decision, however, was based on a statute of that state requiring every conveyance by deed, mortgage, *or otherwise,* to be recorded in the office of the register of deeds of the county where the real estate is situate, otherwise, to be void as to any subsequent purchaser for value and without notice whose conveyance was first duly recorded. The court held that a release, whether done by an entry in the margin of the record, or by a certificate of discharge, was a conveyance according to the definition of "conveyance" in another section of the statute. So, after all, this case went off on a question of statute law, and cannot be seriously considered as authority on the question under discussion.[30]

Another case frequently cited by the text-book writers in support of this view, is that of *Thompson* v. *McKay.*[31] What was decided

[30]Palmer v. Bates, 22 Minn. 532; Merchant v. Woods, 27 Minn. 396.

[31]The decision of Merchant v. Woods (supra) may be correct under the Minnesota statute, which defines a release deed as a conveyance, thereby bringing it

in that case is, that when property is conveyed to a trustee to rent and sell, and apply the proceeds to the payment of a debt of the grantor, a *bona fide* purchaser at the trust sale acquires a good title, even if the trustee before the sale had received sufficient money from the rents to pay the trust debt. This is certainly sound law; but the distinction is obvious. In this case the trustee was also the *agent* of the grantee to collect the rents and apply them to the debt —this is not the duty of an ordinary trustee—it was therefore for him to say when the debt had been paid, and all parties to the deed were clearly bound by his actions in this regard on the principle of agency.

The courts of many other states hold that payment of the debt secured extinguishes the lien, and that the trustee's sale after payment cannot convey good title even to a remote *bona fide* purchaser. The case of *Huntington* v. *Grafton*[32] is in point. There a portion of the debt secured under a deed of trust had been paid, and a release was made of part of the land, but this release had not been recorded. Notwithstanding this, the trustee sold and conveyed the

under the control of the recordation statute above referred to. It is not, however, believed that released deeds are contemplated by our corresponding Virginia statute, Code, sec. 2465, or included within its terms. According to the great weight of authority, the deed of trust or mortgage is extinguished by payment of the debt, secured thereby, the legal title reverting to the grantor by operation of law without any reconveyance or release; the office of the release deed is rather to show that the debt has been paid, than to transfer title; it is not a "deed conveying any such estate or term" as contemplated in sec. 2465. The mention of various kinds of conveyances in that section seems also to exclude by implication release deeds. See, also, article in 9 Va. Law Reg. 1, by Mr. Gordon Paxton, entitled "Legal Title in Cases of Satisfied Trusts in Virginia."

So we venture the assertion that in Virginia there is no obligation on the grantor in a deed of trust to have his release deed recorded after payment of the debt; and that if the trustee wrongfully sell after the debt has been paid, the purchaser would get no title unless there were grounds of estoppel.

But in this connection the case of Evans v. Roanoke Savings Bank, 95 Va. 294, must be remembered—here it was held that an unauthorized release of a deed of trust made by the original creditor after the note had been transferred to a third party, and before it had been paid, was binding on the holder of the note where an innocent purchaser had bought the property relying on the records from which it appeared that the deed of trust had been released.

The above decision is interesting from another standpoint—it recalls the doctrine, now abrogated by statute (Code, sec. 2463), of the famous case of Floyd v. Harding, 28 Gratt. 401, where it was held that although the statute required contracts in writing for the sale of real estate to be recorded, this statute did not apply to verbal contracts for the sale of real estate, and that such contracts were valid without recordation as against subsequent creditors—thereby placing verbal contracts on a higher plane than written contracts, which were void as to creditors until recorded. In the case of Merchant v. Woods (supra) no release deed had been given, the notes were paid off and a receipt taken, which of course could not have been recorded. The contention that as there was no release deed given, the recordation statute could not apply, was thus disposed of by the court: "But no greater effect could be given to such a payment than would be accorded to a full deed of release, founded upon any valid consideration, covering and relinquishing all the rights of the mortgagee under his mortgage If such a release, unrecorded, would be ineffectual to defeat the title of an innocent purchaser without notice, acquired under a subsequent and apparently valid foreclosure of the mortgage, clearly a payment of the mortgage debt, unaccompanied by any written release whatever, would be equally ineffectual under like circumstances."

[32]41 Cal. 221

property to the creditor, who, in turn, conveyed it to an innocent third party. It was held that the purchaser acquired no title. Replying to the contention that Grafton was a remote *bona fide* purchaser without notice of the payment of the debt, the court says:

"But it is claimed that the appellee, Grafton, had no knowledge of this release, or the payment of $60 on the note to Masterson (the creditor). It is only necessary in reply to this to say, that the debt which was a lien upon the land having been paid, the lien no longer existed."

There are other cases to the same effect.[33] From these authorities we gather that after the debt has been paid the mortgage is extinguished, and the legal title reverts *eo instanti* to the mortgagor by operation of law without reconveyance. In the absence of statutory provisions, a contrary rule would give greater effect to the security than to the debt which it secures.

DEFECTIVE EXECUTION OF POWER.

Assuming that the trustee has due authority to sell under the deed of trust, that the debt is due, and that the creditor has requested him to exercise the power of sale, we will now consider the effect of a defective execution of this power. Suppose he does not advertise the sale for the requisite number of days, or that the sale does not take place at the prescribed place, or instead of selling at public auction he makes a private sale, or is not present in person at the sale, or purchases the property at his own sale, is the sale thereby rendered absolutely void, or only voidable? Does a remote *bona fide* purchaser with no knowledge of these defects take a good title, or can the original mortgagor, who may have had no actual knowledge of the sale, on discovery of the defect, claim his right to redeem, when the property has perhaps enhanced in value, and valuable improvements have been put on it? We find it stated in the text-books that under any of these circumstances the sale is void. It is also often stated in the opinions of judges that the trustee must strictly comply with the terms of his chart—the deed of trust—else the sale will be void, and his deed confer no title.[34] It is believed that most, if not all, of these were cases where the creditor had bought in the property at the sale and it was still in his hands,

[33] (Tex.) 13 S. W. 542.

[34] Cameron v. Irwin, 5 Hill (N. Y.) 272; Vaughan v. Vaughan, 100 Tenn. 282; 45 S. W. 677; Ferguson v. Coward, 59 Tenn. 572; see, also, Hale v. Horne, 21 Gratt. 112; Young v. Bradley, 101 U. S. 782; see *ante*, note 27.

or it was still in the hands of the immediate purchaser if he were a stranger.

It may be regarded as settled that in either of these cases the sale may be set aside,[35] if the party interested acts promptly, and there are no circumstances similar to those which existed in the cases of *Hughes* v. *Caldwell*[36] and *Morgan* v. *Glendy*.[37] Nor does this seem unreasonable. It is the notice which brings the purchaser to the sale. He can easily ascertain if there has been sufficient advertisement. He is present on the ground and can certainly ascertain if the trustee is present in person, and if the sale is being held at the proper place. It is no hardship on him to hold him chargeable with notice of any and all irregularities attending the sale, if the interested party—owner or creditor—asserts his claim at the proper time.

As to a remote purchaser, however, it is believed that the rule is different; that unless he has notice of the defective execution of the power of sale, he will take good title after he has paid his money and gotten a deed to the property, thereby becoming a complete purchaser. No decision has been found where the sale to such a purchaser has been set aside for mere irregularities in the execution of the power of sale. A patient search of the authorities, and a consideration of the question on its own merits, have convinced us that there is a difference between such a case and that where the trustee has sold without any authority. In the former, he has full authority to make the sale, but does not exercise it properly; the parties to the deed have delegated to the trustee the power of conducting the sale; so it does not seem unjust that they should be

[35]Gibson v. Jones, 5 Leigh 370; Norman v. Hill, 2 Pat. & Heath 676; Shillaber v. Robinson, 97 U. S. 69.

[36]Shillaber v. Robinson, 97 U. S. 69; Cassell v. Ross, 33 Ill. 245; Stephens v. Clay (Col.), 31 Am. St. Rep. 328; the Virginia cases cited above.

In Stephens v. Clay (supra), the deed required advertisement of the notice of sale for 90 days, but the trustee only advertised it for 89 days. The sale was set aside, and one of the owners (the other owners gave quit claim deeds) given the right to redeem her portion of the property. But here the purchaser was both the immediate purchaser and the creditor secured. This case is also authority for the proposition that where the trustee has once executed his trust, although wrongfully, the power of sale, so far as he is concerned, is absolutely extinguished, and he cannot cure the defect by making another sale. Here, after the trustee discovered the defect, he re-advertised the property for sale, sold it to the same purchaser, and gave him another deed for it; but the court held that the second sale was of no effect whatsoever, that by the first sale the legal title passed to the purchaser, and he took it impressed with the trust, which could be enforced in one of the following modes: (1) The cumulative remedy of a regular judicial foreclosure and sale is allowed; (2) or a decree is entered requiring the grantee to execute the power in accordance with the terms of the trust deed, as the trustee should have done; (3) or the execution of the power is by decree devolved upon a new trustee appointed for the purpose.

[37]11 Leigh 348; 92 Va. 86.

bound by his actions in this regard as against an innocent purchaser. In the latter case, however (*i. e.* where the trustee sells without authority), the purchaser, innocent though he be, is put on notice that before the trustee has any right to sell someone else is to be consulted, that the trustee cannot sell of his own volition, and that there are certain conditions precedent which must be complied with. There are numerous cases which hold that defective execution of the power of sale is of no effect as against a remote *bona fide* purchaser,[38] and, while in none of the cases which have fallen under our observation has this distinction been discussed, still the net result of the decisions establishes it.

THE LIABILITY OF TELEGRAPH COMPANIES FOR NEGLIGENCE IN THE TRANSMISSION AND DELIVERY OF MESSAGES.

By GRAHAM B. SMEDLEY, University of Virginia.

[*Continued from September Number.*]

III. NEGLIGENT BREACH OF DUTY AND CONTRIBUTORY NEGLIGENCE.

(1). *The Duties of Telegraph Companies and their Breach.*

The duties of telegraph companies in regard to messages are to receive, to transmit, and to deliver them. If they refuse to receive for forwarding any proper message properly presented, as we have already seen, an action will lie to the injured party for damages. So also, an action will lie for failure to exercise due care and diligence in the transmission and delivery of messages. We have al-

[38]Long v. Rogers, Fed. Cas. No. 8482 (sale made at wrong place—nevertheless a remote *bona fide* purchaser took good title); Burns v. Thayer, 115 Mass. 89 (sale attacked because trustee had purchased at his own sale—held that a purchaser from him took good title); Gunnell v. Cockerille, 84 Ill 319 (defect in advertisement); Dryden v. Stephens, 19 W. Va. 1 (refusing to set aside a sale on the ground that the price at the trustee's sale was grossly inadequate, where an innocent purchaser has since bought the property). In this last case there is also a *quære* as to the effect on a remote purchaser of a defect in the advertisement, and the *dictum* of Judge Tucker in Gibson v. Jones (supra) is criticised and disapproved.

Wilson v. South Park Commissioners, 70 Ill. 46; Jones on Mortgages (5th ed.), sec. 1913.

On this general subject, see excellent note of Mr. Freeman appended to Tyler v. Herring (Miss.) 19 Am. St. Rep. 263, 266; also, article in 2 Am. Law Reg. (N. S.) 641, 715.